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CURRENT TOPICS.

Two interesting questions, by no means new, arose recently in the Supreme Court of Iowa and Texas Court of Appeals. In the former (Boyce v. Wabash, etc. R. Co.), the plaintiff had had the misfortune to own some mules, which came in contact in the State of Illinois with one of the defendant's "iron horses," and after a contest of brief duration, were "laid low." The aggrieved owner for some reason not apparent, asked the courts of Iowa for justice in the shape of double damages, according to the "killing stock" statutes. It so happens that the legislatures of the two States were of the same mind upon this question, and a railroad in either State is "mulcted" to the same extent. The question was whether the courts of Iowa could give the aggrieved owner double damages, it being claimed that the Iowa statute could not be appealed to, because the Iowa statute was contemplated for the protection of Iowa mules only, and that the Illinois statute could not be invoked, because it had no extra territorial force, *i. e.*, the courts of another State could not enforce it. But the court said that it was "not an attempt to give extra territorial force to a statute" of the State of Iowa, or "to recover under a statute thereof for the invasion of a right or the infliction of a wrong in some other State." After stating that a common law tort is transitory, and, therefore, may be the foundation of an action anywhere, (Smith v. Bull, 17 Wend. 323); and referring to "two recent and well considered cases," as having "decided that an action for wrongful death will lie in a different State from that in which it occurred, (Dennick v. R. Co., 103 U. S. 11; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48,) it contends that the correct doctrine is that "whenever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

The Texas case (Willis v. Mo. Pac. R. Co.) was a suit to recover damages for the negligent killing of the plaintiff's husband. The killing occurred in Indian Territory, where it seems that no remedial law exists in cases of this character. The court lays down the correct rule to be that while an action based upon injuries recognized by universal law may be brought anywhere, yet when the right of action does not exist except by virtue of statutes, "it can be enforced only in the State where the statute is in existence and where the injury has occurred;" that Texas by her statute provided only "for cases occurring within her borders" making "that an actionable tort which was not so before at common law;" that "the government exercising authority in the locality where the act was committed is the only one to determine" whether it "shall be a good ground for suit." The court declined to entertain the question whether the result would have been different, if the Territory had a statute like that of Texas. There is, of course, a distinction between the two cases, and this may be sufficient to reconcile them. There are cases sustaining by analogy the Iowa decision; the same may be said of the Texas case.

BAGGAGE AND ITS DELIVERY TO THE CARRIER.

General Rule as to Liability.—Carriers of passengers are, as respects the carriage of baggage, held to the same degree of responsibility as carriers in general. They must answer for the loss of it though it happen without their fault. They are insurers against everything save the act of God or of the public enemy.[1] Baggage in a carrier's possession is entitled to the same protection and the carrier is liable for their safety to the

1 Macklin v. N. J. Steamboat Co., 7 Abb. Pr. (N. S.) 229; Merrill v. Grinnell, 30 N. Y. 549; Roth v. Railroad Co., 34 N. Y. 548; Fraloff v. N. Y. C. R. Co., 10 Blatch. 16; Miss. Cent. R. Co. v. Kennedy, 41 Miss. 671; C. & A. R. Co. v. Brooks, 13 Wend. 611; Orange County Bank v. Brown, 9 Wend. 85. If the carrier, however, is not liable for baggage, voluntary assistance by the agent of the company in looking for it, or an offer by way of gratuity to pay something on account of the loss of it, will not render it liable. M. S. etc. R. Co. v. Myers, 21 Ill. 627.

same extent as if they were goods intrusted to him as freight.

Basis of the Carrier's Obligation.—The grounds upon which rests the obligation of a carrier as to the carriage of baggage are two; public policy and contract. A common carrier is a servant of the public Its policy requires him to carry freight, passengers and baggage. He can not refuse absolutely to carry a person or his property, although he may make reasonable regulations for the carriage of either.

The contract which a common carrier makes to carry a person as a passenger requires him to carry not only the passenger, but also a reasonable amount of his personal baggage. This is true although nothing is received or paid for the carriage of the luggage in addition to the sum paid for the carriage of the passenger;[2] and although a carrier is not ordinarily liable for merchandise carried by a passenger as baggage, he may make himself responsible for it by a contract so to carry it.[3]

Compensation for Carrying Baggage.—As before stated the compensation for the carriage of baggage is included in the price of the passenger's ticket.[4] But where baggage has been shipped without the prepayment of charges this does not constitute the carrier a mere gratuitous bailee, responsible only for gross negligence in the carriage of the goods. On the contrary, he is entitled to reasonable freight money, and has a lien upon the baggage for it until paid.[5] And the carrier is not guilty of any tortious conversion in refusing to give up the baggage until the passage money is paid.[6]

It is the same with a carrier upon land as with one upon the water. But the carrier has a lien for fare only upon the baggage in his possession. He can not seize property in possession of the passenger as security for fare. Where a railway conductor seizes, or attempts to seize, articles of property in a seat with a passenger and in his possession, in order to compel the payment of fare, he commits an assault upon the passenger, for which the company is liable.[7]

Quantity of Baggage.—The quantity and value of property allowed to be carried by a passenger as baggage, depends upon the reasonable regulations of the carrier, or, in the absence of these, upon various considerations, such as the station of the person in society, the length of the journey, the personal habits of the passenger. The courts have wisely allowed the question: What may a passenger carry with him as baggage? to remain an open one.[8] It is a question for the jury to decide, and their decision upon it is not reviewable by an appellate tribunal.[9]

The obligation of the carrier is to carry the baggage of a passenger in the baggage car of the train in which he travels, and to deliver it to the passenger at his destination in the usual manner of transporting and delivering baggage. This duty is the same whether the baggage is within the quantity allowed, or whether it is extra, for which an additional charge is made. In either case it is to be carried as the baggage of the passenger unless there is an agreement to the contrary.[10] As a condition precedent to any contract to carry baggage, the carrier may require information as to its value, and make additional charges where the value exceeds that of baggage allowed free.[11] If extra charges are paid, and the baggage accepted, the carrier is of course responsible for its safety.[12]

Disclosure of Value.—A person who sends baggage by a common carrier, is not bound to declare its value unless required to do so. In the absence of proof to the contrary this will be presumed to be the law of a foreign State.[13] No disclosure of value is required to be volunteered even where a passenger's trunk contains specie, and notwithstanding

[2] Merrill v. Grinnell, 30 N. Y. 549; Hannibal R. Co. v. Swift, 12 Wall. 262; Macklin v. Stmbt. Co., 7 Abb. Pr. (N. S.) 229; Hawkins v. Hoffman, 6 Hill, 586; Orange County Bank v. Brown, 9 Wend. 85.

[3] Collins v. B. & M. R. Co., 10 Cush. 506; Alling v. B. & H. R. Co., 126 Mass. 121.

[4] Nevius v. Bay State Stmbt. Co., 4 Bosw. 225. And cases *supra*.

[5] The Elvira Harbeck, 2 Blatch. 336.

[6] Wolf v. Simmons, 2 Camp. 631.

[7] Ramsden v. B. & A. R. Co., 104 Mass. 117.

[8] Merrill v. Grinnell, 30 N. Y. 549; Nevius v. Bay State Stmbt. Co., 4 Bosw. 225.

[9] Fraloff v. Railroad Co., 100 U. S. 224.

[10] Glasco v. N. Y. C. R. Co., 30 Barb. 557; Fairfax v. N. Y. C. etc. R. Co., 37 N. Y. (S. C.) 516.

[11] Fraloff v. Railroad Co., 100 U. S. 24.

[12] Stoneman v. Erie R. Co., 52 N. Y. 429. Under a regulation allowing each passenger 50 lbs. of baggage, a husband and wife travelling together, are entitled to one hundred weight. Great Northern R. Co. v. Shepherd, 8 Exch. 30.

[13] Brown v. Railroad Co., 83 Pa. St. 316.

the advertisement of the carrier that passengers are "prohibited from taking anything as baggage but their wardrobe, which will be at the risk of the owner," The extra weight of the passengers baggage having been paid for and the carrier's agents having taken charge of it, it was held immaterial whether the trunk was viewed in the light of baggage or of freight. The carrier in either case was responsible for its loss through the negligence or fraud of its agents.[14]

While the rule is generally that carriers of freight or baggage are bound to inquire of passengers or shippers as to the contents of packages if they desire to know,[15] this is not true if there be any deceit or fraudulent practices on the part of the passenger. Thus if at the beginning of a journey plaintiff introduce gold into the coach in which he was to ride, secretly, and attempt to get it carried for nothing, he would be guilty of a gross fraud and could not recover for the loss of the gold.[16] Where a traveling salesman delivered to the defendant railway company a trunk such as is usually carried by men of his class, and the trunk contained jewelry sufficient in amount to stock a retail store—but the baggage-master had no reason to suppose that such was the contents, it was held that the officers of the company had a right to rely upon the representation, arising from implication, that the trunk contained nothing but ordinary baggage.[17]

When Responsibility Begins.—The responsibility of a carrier commences immediately upon the delivery of the baggage to him or his authorized agent.[18] Where plaintiff brought his trunk to the depot to be checked, and was informed that it was not customary to check baggage until about fifteen minutes before train time, and the trunk was left at the depot, and at the end of the journey money had been stolen from it either at the depot or on the train, it was decided that the trunk when first delivered was left for transportation and not for storage, and that the carrier's responsibility commenced as soon as it received the trunk.[19] If there be no delivery of the baggage to the carrier there is no liability for it on his part. Thus a railway carrier has been decided not to be responsible for the loss of an overcoat left by the passenger in his seat upon going out of the cars.[20] It is immaterial, however, when the baggage comes into possession of the carrier, whether at the time the check is issued or subsequently. When it is once established that the baggage is in the hands of the carrier to be transported to the destination of the passenger, the carrier's liability as an insurer becomes fixed in case a loss occurs.[21] The check is *prima facie* evidence of delivery to the carrier,[22] but it may be overcome by proof showing that the baggage was not in fact delivered to the carrier when the check was issued.[23]

A deposit of baggage upon the deck of a boat at the place usually given to such uses, and with the baggage of other passengers, constitutes a delivery to the carrier.[24] It seems, too, that the personal baggage of a passenger on a steamboat, if deposited by him in his stateroom and the stateroom be locked, will be held to have been delivered to the carrier for transportation, and he will be liable in case it is stolen. But not if the passenger knows the stateroom is without a lock, there being no proof of usage authorizing such deposit of baggage, no evidence of specific direction or assent on the part of the carrier, and no proof that the carrier was guilty of negligence in not providing a lock for the room.[25]

The delivery must be to an agent of the carrier authorized to receive baggage. Delivery to an agent engaged in other duties will not suffice.[26] Nor will delivery to a man at the station who was supposed to be a baggage master answer.[27]

Delivery to a porter who accepted and dromised to label baggage is sufficient.[28]

[14] C. & A. R. Co. v. Balduf, 16 Pa. St. 67.
[15] Mich. Cent. R. Co. v. Carrow, 73 Ill. 348.
[16] Hollman v. Hollady, 1 Woolw. 365.
[17] Mich. Cent. R. Co. v. Carrow, 73 Ill. 348.
[18] Woods v. Devin, 13 Ill. 746.
[19] Hickox v. R. Co., 31 Conn. 281.
[20] Tower v. Utica Ry. Co., 7 Hill, 47; Dibble v. Brown, 12 Ga. 217.
[21] C. R. I. & P. Ry. Co. v. Clayton, 78 Ill. 616.
[22] Dill v. R. Co., 7 Rich. Law, (S. C.) 158; C. R. I. & P. Ry. Co. v. Clayton, 78 Ill. 616.
[23] C. R. I. & P. Ry. v. Clayton, *supra*. The fact of delivery is a question for the jury. Dibble v. Brown, 12 Ga. 217; Smith v. Railroad Co. 44 N. H. 325.
[24] Doyle v. Kiser, 6 Ind. 242.
[25] Gleason v. Goodrich Trans. Co., 32 Wis. 85.
[26] Ibid.
[27] Butler v. Railroad Co., 3 E. D. Smith, 571. See also Rogers v. Railroad, 38 How. Pr. 289; Minter v. Railroad Co., 41 Mo. 503.
[28] Lovell v. L. C. & D. R. Co., 45 L. J. Q. B. Div. 476.

Where a passenger handed his baggage to a porter who was about to go to have it labelled when the passenger said he would take it with him in the carriage. The porter then left suddenly and the passenger went to get his ticket, leaving the bag on the platform. On his return the baggage was missing, a nonsuit of the passenger was reversed, the court holding that there was evidence of a bailment to the company which had not determined.[29] Where it was shown that the plaintiff bought a ticket with coupons for connecting lines, and received for his baggage a check marked with the names of each road, and that defendant, the last carrier, failed to produce the baggage for the check, it was held that there was no proof of delivery to such carrier or of loss while in his possession.[31]

In the following instances the carrier was held not liable for the baggage lost, on the ground that it had never been delivered to him. Jewels were left in a box in a dress-pocket left in a stateroom.[31] But in Michigan it has been said that if it was the usual and prudent course of plaintiff on retiring at night, to put her gold chain in her dress pocket as well as to carry money there, instead of putting it in a trunk and delivering it to carriers as baggage, then no notice to the carriers was necessary as to the contents of her pockets, any more than notice would have been necessary as to the contents of her trunk, had the money and chain been placed there.[32] The remaining instances may be found in the foot notes.[33]

After the baggage has been delivered to the carrier his responsibility begins and he is liable for its loss. It would be interesting to examine further the cases illustrating his liability for baggage, but such an examination is beyond the scope and limits of this essay.

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29 Leach v. S. E. R. Co., 34 L. T. (N. S.) 134.

30 Kessler v. N. Y. C. Co., 7 Lans. 62.

31 Del Valle v. Stmbt. Richmond, 27 L. Ann. 90.

31 McKee v. Owen, 15 Mich. 115.

33 Watch stolen. The watch was worn upon the person during the day time and, upon retiring was hung in a waistcoat on a hook used for that purpose in a stateroom. There was no lock on the door; it was not the custom of the company to have locks, and this was known to the passenger. Clark v. Burns, 118 Mass. 275. U. S. bonds and securities amounting to $16,000, which were carried in the breast pocket of the passenger, and of which the carrier had no knowledge. The passenger was robbed by three men who came in the car when none of the railway employees were present. Weeks N. Y. & N. H. R. Co., 9 Hun. 669. Trunk taken with passenger and lashed under his berth. The passenger retained exclusive possession and control of it until it was stolen. Cohen v. Frost, 2 Duer. 335. Portmanteau robbed after it had been placed at passenger's request in his compartment. Passenger got out at an intermediate station and having negligently failed to find the same carriage, finished his journey in another one. During his absence the portmanteau was robbed. Talley v. G. W. R. Co. L. R. 6 C. P. 44. Jewelry left in a stateroom in a small hand satchel. The passenger had not offered to put it in the carrier's custody and he had no notice of it. The robbery occurred while the passenger was at tea during the voyage. R. E. Lee, 2 Abb. (N. S.) 49. Money deposited in the valise of a fellow passenger, the defendant having no notice. In such a case there can be no recovery, even if the carrier be guilty of gross negligence, for there is no contract between the parties for the carriage of any luggage. Stewart v. Int. Stmbt. Co., 98 Mass. 371.

MALICIOUS ACT GIVES NO RIGHT OF ACTION.

The opinion is quite prevalent, especially among laymen, that every malicious act affords a ground of action, and certainly if such malice is accompanied by an unlawful act, although no damages result therefrom. No doubt it is due to the fact that malice and legal wrong are often used as convertible terms. But malice of itself never amounts to a legal wrong.

The Supreme Court of Maine[1] furnishes a late adjudication upon this subject in which many authorities are cited and commented upon. In this case the plaintiff owned a certain dwelling house on Hurrican Island which he had rented to one Sanborn at a stipulated sum. The defendant was the owner of said Hurrican Island, having extensive quarries there, was doing a large business, employing several hundred men. Defendant refused to employ any one who occupied plaintiff's house, and threatened to discharge from his employ Sanborn, if he did not quit the same, and by reason of such action on the part of defendant, Sanborn left the house. In an action by the owner of said house against defendant, the court held that he was not entitled to recover, even if defendant acted wilfully and maliciously in inducing Sanborn to quit the premises; that the motive which induced

1 Heywood v. Tillson, 29 A. L. J. 27.

him to make that a condition of employment could not be a ground of complaint. The court, per Appleton, C. J., said: "Besides an employer has a vital interest in the welfare of his men. He has a right to see that they are not plundered. It was a perfectly proper motive for the defendant to interpose to prevent an extortionate rent * * * * His own interest and his interest in the success of his employees, without the imputation of anything sinister on his part, afford good and sufficient reason for his intervention. * * * So he may by contract stipulate with his men where they shall not board, may equally determine where, and by whom, they may rent the house they may occupy, and where they may not. The house may be in an unhealthy part of the city, or in a disreputable neighborhood. But whatever the reason, good, bad, or indifferent, no one has a right to complain."

An act which does not amount to a legal wrong gives no ground of relief. "The exercise of one man of a legal right can not be a legal wrong to another."[2] For an act to amount to a legal wrong there must be some denial of a legal right. "For every legal injury there is a remedy." Every legal wrong is an infringment of a legal right, and this must result in loss to become an actionable, private wrong. Then it logically follows that no action lies for a wrongful or illegal act unaccompanied by loss, *i. e.*, unless a private injury has been inflicted.[3] In passing it may be proper to remark that there is a line of of authorities[4] which seem to countenance the doctrine of allowing damages without distinct proof of actual injury in accordance with the principle that "wherever there is a wrong, there is a remedy to redress it." Yet these cases proceed upon the assumption that a legal right has been invaded, a legal injury inflicted, from which damages are likely to ensue,[5] hence there is nothing in conflict with the proposition that a wrongful act of itself constitutes no cause of action.

Likewise, the principle is deduced that no loss occasioned by the act of another in the absence of wrong, however great, will constitute a legal injury,[6] or the rule may be thus stated, that loss arising from the exercise of a legal right, gives no cause of action. In legal language it is termed a *damnum absque injuria*.[7]

[2] Cooley on Torts, 688; Stevenson v. Newham, 13 C. B. 286, 297; Floyd v. Barber, 12 Co. 23; Stoball v. Ansell, Comb. 11; Taylor v. Hemiker, 12 Ad. & El. 488; Head v. Carey, 11 C. B. 977.

[3] Conlinge v. Coxe, 6 C. B. 703; Nichols v. Valentine, 36 Me. 322, Thompson v. Noel, 15 E. 501; Winsmore v. Greenback, Willes, 577; Winterbotton v. Lord Derby, L. R. 2 Ex. 316. The complaining party must also show that he has been injured in contradistinction to others. Wright v. Defrees, 8 Ind. 298; Fuller v. Hadgdon, 25 Me. 243; Nash v. Whitney, 59 Me. 241; Ide v. Gray, 11 Vt. 615; Nye v. Merriam, 36 Vt. 438; Ottawa Gas Light Co. v. Thompson, 39 Ill. 598; McDonald v. English, 85 Ill. 236; Pettibone v. Hamilton, 40 Wis. 402, 416; Mott v. Shoolbread, 13 Eng. Rep. 584 and n.; Rogers v. Rajendro, 13 Moore, P. C. C. 209.

[4] 2 Par. on Cont. 453; Ashly v. White, 1 Salk. 19. See 2 Ld. Raym. 953; Williams v. Esling, 4 Barr. 486; Appleton v. Fullerton, 1 Gray, 186; Alston v. Scales, 2 Moo. & S. 5; Woodman v. Tufts, 9 N. H. 88; Fay v. Prentice, 1 Com. B. 828; Blofield v. Payne, 4 B. & Ad. 410; Pryce v. Belcher, 3 C. B. 58; Jenkins v. Waldron, 11 John. 114.

[5] Taylor v. Henniker, 12 Ad. & Ell. 488; Margett v. Williams, 1 B. & Ad. 415; Lumley v. Gye, 2 E. & B. 16; Webb v. Portland, 3 Sum. 189; Seneca v. Auburn, 3 Cowen, 176. The maxim "*De minimis non curat lex*" is never applied to the wrongful invasion of ones property. 5 Hill, 170; Paul v. Slason, 22 Vt. 231; Pontifax v. Bignold, 3 M. & Gr. 63.

[6] Miller v. Martin. 16 Mo. 508; Clark v. H. & St. J. R. Co. 36 Mo. 202; Boland v. M. R. Co., 36 Mo. 484; Bartholomew v. Bentley, 15 Ohio, 659, 666; Hamilton v. Marquis, 3 Ridg. 267; 2 Barb. 168; 5 Barb. 79; 83 Pa. St. 144; 86 Pa. St. 401; 10 M. & W. 109; Radcliff v. Mayor of Brooklyn, 4 N. Y. 195; Morgan v. Bliss, 2 Mass. 111; McEndre v. Piles, 6 Litt. (Ky.) 101; Nichols v. Valentine, 36 Me. 322; N. A. & S. R. Co., 2 Peterson, 14 Ind. 112; Macune v. Norwich City Gas Co., 30 Conn. 524. But see Gregory v. Brooks, 35 Conn. 446

[7] 2 Ld. Raym. 595; 11 M. & W. 755; Lamb v. Sone, 11 Pick. 527; 10 Metc. 571; Fletcher v. Ryland, 34 L. J. (N. S.) Ex. 177; Tenant v. Goodwin, 6 Mod. 311; Wilson v. Waddie, 2 App. Cas. 95; Lossee v. Buchanan, 51 N. Y. 476; Marshall v. Welwood, 38 N. J. L. 339; Brown v. Collins, 53 N. H. 442; Swett v. Cutts, 50 N. H. 439; Bassett v. Salisbury M'fg. Co., 43 N. H. 569; 25 Vt. 49; 4 N. Y. 195; 14 Conn. 146; 1 Smith L. C. 244; 2 Zabr. 243; 9 Conn. 146; 14 Penn. 214; 3 Barb. 459; 7 Hill (N. Y.) 357; 2 Hill (N. Y.) 466; 8 Conn. 146; 4 Rawle, 9; 1 Gale & D. 589; 4 Dowl. & R. 195; 3 Scott, 356; 2 B. & Ald. 646. Nor loss from accident, Lambert v. Bessey, Sir T. Raym. 421; nor for the act of a lunatic, Krom v. Schoonmaker, 3 Barb. 647; Morse v Crawford, 17 Vt. 499, nor insane justice, Bush v. Pettibone, 4 Comst. 300; nor for one doing a a legal act on his own premises; McLauchlin v. Charlott, 5 Rich. 583; Rockward v. Wilson, 11 Cush. 221; Averitt v. Murrell, 4 Jones Law, 323; De France v. Spencer, 2 Greene. 462; First Baptist Church v. Sch'y etc. R. Co., 5 Barb. S. C. R. 76; nor are public officers liable for doing legal acts which result in injury; White v. Zozoo, 27 Miss. 357; Dermont v. Detroit, 4 Mich. 435; St. Louis v. Gurno, 12 Mo. 414; Lambar v. St. Louis, 15 Mo. 610; Ely v. Rochester 26 Barb. 133; Donovan v. New Orleans, 11 La. Ann. 711; Bigelow v. Randolph, 14 Gray, 541; Levy v. New York, 1 Sandf. 465; Howe v. New Orleans, 12 La. Ann. 481; Duke v. Rowe, 20 Ga. 635; Wilson v. New York, 1 Denio, 595; Comas v. San Francisco, 1 Cal. 452; Hickok v. Platts-

The rule is the same when such act is prompted by malice, unless one's motive can become the basis of a suit. But it may be urged that motive of itself is insufficient, yet when combined with a positive act it is actionable. Does it make a wrong more of a wrong because combined with a legal act, or does the legal act become illegal because of the element of malice? The question resolves itself into this: Can one be sued for his motive? A mere threat to commit an injury is not a "private, actionable wrong."[8] It may never be carried into effect. No one can say that it will be; nor can the law assert that it will. It may be nothing more than an idle declaration, and unless some outward acts, other than the mere assertion, are demonstrated, no one has cause of complaint.

The view taken on this question of the Supreme Court of Maine,[9] has repeatedly received judicial recognition both in this country and in England.[10]

In Missouri, in Hunt v. Simonds,[11] the plaintiff alleged in his complaint that defendants who were officers of various insurance companies confederated and conspired wilfully and maliciously to injure and wholly ruin him in his occupation as commander of a steamboat, and for that purpose without cause, refused to take any insurance upon his boat, whereby he was deprived of all benefit of his occupation, and was compelled to sell his boat and abandon his business. To this complaint defendants demurred, which demurrer the trial court sustained. On appeal the court held that the demurrer was properly sustained, that the action would not lie, for it was in the nature of an action on the case in which damages were sought, and no legal wrong had been done to plaintiff. In the opinion the court said; "Taking the petition to be true, as we must on the demurrer, the plaintiff has sustained great damage by the conduct of the defendants, but, unless we are prepared to say that he had a legal right to demand that insurance should be taken on his boat, we can find no violation of any of his legal rights."

In a similar case the court observed: "The conspiracy or combination is nothing, so far as sustaining the action goes; the foundation of it being the actual damage done to the party."[12] To render conspirators liable in a civil action, the act which they do must be unlawful: a lawful act instigated by malice will not suffice.[13] Evidence tending to show that an act legal in itself was done "wantonly and with an intention to injure the plaintiff" is inadmissible.[14] In Randall v. Hazelton, the court remarked: "In reference to the term damages the law is that it must be a loss brought upon the party complaining by a violation of some legal right, or it will be considered as merely *damnum absque injuria*. There is a large class of moral rights and duties, sometimes called imperfect rights and obligations, which the law does not attempt to enforce or protect. The refusal or discontinuance of a favor gives no cause of action. * * * Damages can never be recovered where they result from a lawful act of the defendant."[15] In another Massachusetts case it was said, "that no action will lie against one for acts done upon his own land in the exercise of his right of ownership whatever the *motive*. * * * The *motive* in such cases is *immaterial*."[16]

burg, 15 Barb. 427; Prather v. Lexington, 13 B. Mon. 559; Stewart v. New Orleans, 9 La. Ann. 461; Lewis v. New Orleans, 12 Id. 190; St. Johns v. New York, 6 Denio, 315; 8 W. & S. 85; 1 Pick. 418; 12 Id. 467; 23 Id. 360; Sedg. on Dam. 29, 111.

8 Cooley on Torts.

9 Heywood v. Tillson, *supra*.

10 Cottrel v. Sones, 73 E. C. L. 713; Benjamin v. Wheeler, 8 Gray, 409; Randall v. Hazelton, 12 Allen, 415; Walker v. Cronan, 107 Mass. 564; Frazier v. Brown, 12 Ohio St. 294; Chatfield v. Wilson, 28 Vt. 49; Mahan v. Brown, 13 Wend. 261; Delhi v. Youmans, 50 Barb. 316; Wheatly v. Baugh, 25 Pa. St. 528; Bradley v. Fuller, 118 Mass. 239; Glendon I. Co. v. Uhler, 75 Pa. St. 467; Jenkins v. Fowler, 24 Pa. St. 308; Phelps v. Nowlen, 72 N. Y. 45; Pickard v. Collins, 23 Barb. 444; South Royalton Bank v. Suffolk Bank, 27 Vt. 505; Harwood v. Jones, 32 Vt. 724; Hunt v. Simonds, 19 Mo. 583; Kiff v. Youmans, 86 N. Y. 324; Ocean Co. v. Sprague, 34 Conn. 529; Rogers v. Rajendro Dutt, 13 Moore, P. C. 209; 9 W. R. 149; Davenport v. Simpson, Cro. Eliz. 250; Revis v. Smith, 18 C. B. 125; Henderson v. Broomhead, 4 H. & N. 569; Cunningham v. Brown, 18 Vt. 123; Dunlap v. Glidden, 31 Me. 435; White v. Carroll, 42 N. Y. 161; Parter v. Thomas, 23 Geo. 467; Moran v. Smell, 5 W. Va. 26.

11 Hunt v. Simonds, 19 Mo. 583.

12 Hutchinson v. Hutchinson, 7 Hill, 107; Tappan v. Powers, 2 Hall, (N. Y.) 277; 1 Saud. 230, and note 4; Laville v. Roberts, 1 Ld. Raym. 376; Patton v. Gurney, 17 Mass. 186; Sheple v. Werner, 2 Paige; 12 Vt. 533; Wellington v. Small, 3 Cush. (Mass.) 149.

13 Adams v. Paige, 7 Pick. 550; Herron v. Hughes, 25 Cal. 535.

14 Benjamin v. Wheeler, 8 Gray, 409.

15 Randall v. Hazelton, 12 Allen, 412, 415.

16 Walker v. Cronin, 107 Mass. 564.

The same doctrine has obtained in Vermont.[17] In Chatfield v. Nelson, it was held that an act legal in itself and which violated no right can not be made actionable on account of the *motive which induces it.* New York has uniformly declared the same rule. In Mahan v. Brown the defendant had erected a high fence for the sole purpose of obstructing the light of his neighbor's house. It was held that no action would lie where the lights were not ancient, and no right had been acquired by grant or user; that the motive with which the act is done is immaterial. In the opinion, Savage, Ch. J., observed: "No one legally speaking is injured or damnified unless some right is infringed. * * * The plaintiff in this case has only been refused the use of that which did not belong to her; and whether the motives of the defendant were good or bad, she has no legal cause of complaint." [19] In Pickard v. Collins it was held that motive cannot be made a ground of action in doing a legal act.

The same is true in Pennsylvania.[20] In Jenkins v. Fowler, it was declared that the commission of a lawful act is not actionable, though it proceeded from a malicious motive, that the court could not consider feelings and motives. In the opinion, Black, J., remarked: "Malicious motives may make a bad act worse, but they can not make that wrong which in its own essence is lawful * * * Any transaction which would be lawful and proper if the parties were friends can not be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no *act* which violates it, we must leave his motives to Him who searches the heart." [21]

[17] Chatfield v. Wilson, 28 Vt. 49; Royalton v. Suffolk, 29 Vt. 505; Harwood v. Banton, 32 Vt. 724.

[18] Mahan v. Brown, 13 Wend. 261; Auburn v. Douglass, 9 N. Y. 444, 450; Delhi v. Youmans, 50 Barb. 316; White v. Carroll, 42 N. Y. 161; Pickard v. Collins, 23 Barb. 444, and N. Y. cases above cited.

[19] Panton v. Holland, 17 Johns. 92; Harwood v. Tompkins, 24 N. J. 425; Thornton v. Thornton, 63 N. C. 211; Jenks v. Williams, 115 Mass. 219; Stearns v. Sampson, 59 Me. 568, 572; Cunningham v. Brown, 18 Vt. 123; Dunlap v. Glidden, 31 Me. 435.

[20] Cavarhovan v. Hart, 21 Pa. St. 495; Jenkins v. Fowler, 24 Pa. St., 308; Wheatly v. Baugh, 25 Pa. St. 528; Glendon v. Uhler, 75 Pa. St. 467; Smith v. Johnson, 76 Pa. St. 191. See Clinton v. Myers, 46 N. Y. 571; Frazier v. Brown, 12 Ohio (N. S.) 294; McMillen v. Staples, 36 Ia. 532; Thompson v. Agnew, 24 Miss. 93.

[21] Bowen v. Hull, 20 Am. L. Reg. 578.

There are cases where malice is considered as an aggravating element, as in inducing another to break a contract,[22] or enticing a servant to leave his master where there is a contract,[23] but these are founded on an unlawful act, and the law permits no one to do an unlawful act to the injury of another without paying damages. One has a right to be let alone in his business, make his own contracts, employ his own servants, and any unlawful interference is actionable. But the action is based on the unlawfulness of the interference and not upon the motive which prompted it. If one has a right he must of necessity have a means to vindicate and maintain it, and indeed a remedy if he is injured in the exercise of its enjoyment. "Want of a right and want of a remedy are reciprocal."

It is the pride of the common law, that, whenever it recognizes or creates a private right, it gives a remedy for the wilful violation of it. But the law does not assume to regulate the individual conscience and dispel conceptions of ill-will, hatred and malice from the human breast by subjecting one to a lawsuit if he entertains such. The province of courts is to protect and secure to individuals their legal rights—to administer justice between man and man—and not to attempt to scrutinize the rectitude of every man's conscience—a thing impossible—and see that he harbors no ill-will for his brother. Courts are forums of justice and not forums of conscience; they were established to administer law, not morals. As long as one keeps within the legal domain, he will not be molested so far as the courts are concerned.

Necessity required that there should be some standard by which individuals should be governed; that there should be a limit beyond which the law should not go in regulating the affairs of men, and at the same time secure to each the full enjoyment of his life, liberty and property. That standard was established when the law declared that no action lies for doing a legal act, however injurious the consequences to another. This is the standard by which all rights and duties of this nature are to be measured. So far as we know there are no exceptions. In the practical application of the rule the test al-

[22] Boston Glass M'fg. Co. v. Binney, 4 Pick. 425.

[23] Yates v. Joyce, 10 Johns. R. 136.

ways is: Was the act which caused the injury legal, or if illegal was it followed by damages, and not was it caused by malice? If it is legal, or if illegal and no damages result, as above shown, no action can be maintained, however maliciously it may have been done.

EUGENE MCQUILLIN.

St. Louis, Mo.

TELEGRAPH — CIPHER DISPATCH — NEGLECT TO DELIVER—MEASURE OF DAMAGES.

DOUGHTERY v. AMERICAN, ETC. TEL. CO.

Supreme Court of Alabama.

1. Where a declaration discloses some damage, the mere fact that it claims a grossly larger amount, does not lay it open to objection by demurrer. The only opportunity to test that question is at the trial.

2. The measure of damages for failure to deliver a telegraph message is the actual loss proximately flowing from such neglect, regardless of the knowledge or ignorance of the employees of the company of the importance of its prompt delivery. Therefore, such company is liable to the same extent for failure to deliver a message in cipher as one expressed in plain language, although the operator was ignorant of its meaning.

Appeal from the circuit court.

STONE, J., delivered the opinion of the court:

The present suit is an action of assumpsit, brought by the appellant against the appellee, Telegraph Company, to recover damages for the non-delivery of a message, which the latter received, and, for a consideration, promised to deliver. The message was in cipher, and did not disclose to the uninitiated what its meaning and purpose were. Though expressed in letters of the English alphabet, and susceptible of being rendered into sound, they were but symbols, not understood, and not intended to be understood, save by those instructed in the secret art. They were not explained to the telegraph operator, and he was ignorant of the purport and object of the message. It was addressed to a well known firm of cotton brokers in the city of New York, and the complaint alleges that if it had been transmitted and delivered to that firm according to the usual course of telegraphy, they would have understood it, and acted on it. That its true import was a direction to the brokers to sell three hundred bales of cotton previously purchased by plaintiff in that city, one hundred bales to be delivered in that month—January, 1881—and the remaining two hundred bales to be delivered in the month of May following. That if the message had been transmitted and delivered in due time, the brokers would have made the sale, and thus realized to him, the sender, one hundred dollars profit in the purchase and resale. That in consequence of the non-delivery of the message, the cotton was not sold, but remained on hand; and when, several days afterwards, it became known and necessary to send a second direction to sell, in consequence of the non-delivery of the first, the price of cotton had materially declined; and, on a sale then made, plaintiff sustained a loss of a thousand dollars. Plaintiff claims this sum, as damages suffered by the defendant's breach of contract. Several grounds of demurrer were interposed by the defendant, and the circuit court sustained them all. The fourth ground is in the following language: "The complaint shows that the dispatch sent was a cipher dispatch, unintelligible to the operator—agent—that sent the same, and it fails to show that the said agent was informed as to the importance and value of the said dispatch, or that it was of any importance."

The ruling of the circuit court on this ground, or cause of demurrer, is sought to be maintained by the following argument: That in suits for breach of contract, only such damages can be recovered, as were within the contemplation of the parties when the contract was entered into; that the telegram attempted to be sent in this case, being in cipher and its contents and purpose unknown to the company's operator, it is impossible the damages claimed could have been within the contemplation of the telegraph company, or its operator. On this ground it is claimed that only the price paid for the telegram can be recovered. This concession itself shows that this ground of demurrer should not have been sustained. If any thing was recoverable, demurrer is not the way to test the extent of recovery. That is done by objections to the testimony, and by charges. But, aside from the right to recover the cost of the message, whenever there is an unwarranted breach of contract, some damages may be recovered—nominal damages at least. The argument here urged has a wider and deeper scope, and denies the right of the plaintiff to recover the loss sustained in the delayed sale of the cotton.

The authorities fully sustain the proposition that if the telegram had been expressed in plain language, directing the sale of plaintiff's cotton, and the telegraph company, without lawful excuse, failed to transmit and deliver it in due time, then the plaintiff can recover the actual damage he sustained by the fall in the market price of cotton, between the time it would have been sold if the message had not been delayed, and the time it was actually sold. Of course, this is qualified by another principle, namely: That as soon as the plaintiff discovered his message had not been forwarded it became his duty, within a reasonable time, to take the requisite steps to prevent further loss. This is usually done by repeating the order or direction to sell. The following authorities support the proposition asserted above: Squire v. A. & B. Mag. Tel. Co., 41 N. Y. 544; True v. Int. Tel. Co., 60 Me. 9; N. Y. & W. Pr. Tel. Co. v. Dozburg, 35 Penn. St. 298; U. S. Tel.

Co. v. Wenger, 55 Penn. St. 262; W. & N. O. Tel. Co. v. Hobson, 15 Grat. 122; W. U. Tel. Co. v. Ward, 23 Ind. 377; Tyler v. W. U. Tel. Co., 60 Ill. 421; Manville v. W. U. Tel. Co., 37 Iowa, 214; Turner v. Hawkeye, Tel. Co., 41 Iowa, 458; Elwood v. W. U. Tel. Co., 45 N. Y. 544; W. U. Tel. Co. v. Blanchard, 68 Ga. 299; s. c. 45 Amer. Rep. 480. In many of these cases the messages were not self-explaining.

In support of the main ground of demurrer under consideration, appellee relies on the following authorities: Langsberger v. Magn. Tel. Co. 32 Barb. 530; Baldwin v. U. S. Tel. Co. 45 N. Y. 744; U. S. Tel. Co. v. Gildersleeve, 29 Ind. 232; Bank v. W. U. Tel. Co., 30 Ohio St. 555; Candee v. W. U. Tel. Co., 34 Wis. 471; Beaupre v. Pac. & Atl. Tel. Co., 21 Minn. 155; Mackay v. W. U. Tel. Co. 16 Nev. 222; Hobbs v. L. & S. W. Rwy. Co., 10 L. R. (Q. B.), 111. The following cases, cited from Allen's Telegraph cases—(the reports are not in our library), are also relied on: Shields v. Wash. Tel. Co. (La.) page 5; Lane v. Mont. Tel. Co. (Canada) 61; Stevenson v. Mont. el. Co. 71; Kinghorne v. Mont. Tel. Co. 98. Some of these rulings were made on cipher telegrams, others are messages which, unexplained, did not disclose the extent or full import of any transaction had in contemplation by the parties; and in all, substantial damages were refused, because neither the messages, nor other information given, made known to the operator what was contemplated. Hence it was ruled, that plaintiffs could not recover of the telegraph company what, not understanding, it could not have contemplated as the effect of a miscarriage or other failure. These authorities sustain the argument they are cited to support. Several of the cases, however, rest, not on cipher telegrams, but on messages which, by their brevity, or for some other reason, failed to give full information of their import. They are not reconcilable with several of the cases cited by us, in which plaintiffs recovered.

The question we are considering, in reference to cipher or obscure telegrams, is of comparatively modern presentation. The oldest adjudication, asserting the doctrine contended for, is little more than a dozen years old. The telegraph itself is a new invention, and, of course, special rules adapted to it must be modern. Possibly the oldest case, which withheld damages because the dispatch was unintelligible to the operator, was a *nisi prius* ruling in Louisiana, in the case of Shields v. Washington & N. O. Tel. Co,, reported in 1 Livingston's Law Mag. 69; 4 Amer. Law Jour. N. S. 311. We have no access to the full report of this case, and cannot tell by what authorities it was supported. Landsberger's Case from 32 Barbour, was not in cipher, but was obscure. Relief was denied on the ground that the damages claimed were too remote. That case was decided in 1860. Baldwin's Case 45 N. Y. 744; Gildersleeve's Case, 29 Md. 232; Lane's Case, Allen's Tel. Cases, 61; Stevenson's Case, Ib. 71; Kinghorne's Case, Ib. 98, and Beaupre's Case, 21 Minn. 155, were all similar cases of obscurity in the message—not self-explaining. Candee's Case, 34 Wis. 411, and Mackay's Case, 16 Nev. 222, are cases of cipher dispatches. We can perceive no reason, however, for a different rule, as applicable to the two classes. If it be essential in the case of a cipher telegram that its contents and object be explained, what reason can be urged for a different rule, when the dispatch, though legible, is yet so briefly or obscurely expressed, that no one can understand its import or magnitude, save the sender and receiver? If the information be material in the one case, it must be in the other.

As we have seen, the argument on which the decisions under discussion have been rested, is that they are too remote, not being within the contemplation of the parties. Hadley v. Baxendale, 9 Exch. 341, is relied on as declaring the underlying principle, which supports all these rulings. That case was decided in 1854 by a very able bench, after great deliberation, and is everywhere regarded as a leading case. Plaintiffs were proprietors of a mill at Gloucester, which was propelled by steam, and which was engaged in grinding and supplying meal, flour, etc., to customers. The shaft of the engine got broken, and it became necessary that the broken shaft be sent to an engineer or foundryman at Greenwich, to serve as a model for casting or manufacturing another that would fit into the machinery. The broken shaft could be delivered at Greenwich on the second day after its receipt by the carrier. It was delivered to the defendants, who were common carriers, engaged in that business between these points, and who had told plaintiffs it would be delivered at Greenwich on the second day after its delivery to them, if delivered by a given hour. The carriers were informed the mill was stopped, but were not informed of the special purpose for which the broken shaft was desired to be forwarded. They were not told the mill would remain idle until the new shaft would be returned, or that the new shaft could not be manufactured at Greenwich, until the broken one arrived, to serve as a model. There was delay beyond the two days in delivering the broken shaft at Greenwich, and a corresponding delay in restarting the mill. No explanation of the delay was offered by the carriers. The suit was brought to recover damages for the lost profits of the mill, caused by the delay in delivering the broken shaft. The judgment of the court was pronounced by Baron Alderson. He said: "we think the proper rule in such a case as this is, where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special cir-

cumstances under which the contract was actually made, were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

The first thought which suggests itself in a perusal of the foregoing language is, that it declares two rules for the assessment of damages for a breach of contract. First, where there are no special circumstances in the case, to distinguish it from the great mass of contracts of the same kind. In all such cases, the damages recoverable are such as naturally and would generally result from such breach, "according to the usual course of things." The shipment in this case was a broken casting, usually valuable as old iron, to be recast into something else. It was not the case of a commodity, whose form, appearance and condition indicated nothing. Its natural appearance, that which would strike the general beholder, was, that it was useful, and only useful as old iron. Thus considered, its only appreciable value was its marketable quality; and the damage the shipper would suffer from delay in its delivery would, according to the usual course of things, be the delay in realizing its proceeds, and a fall in the market price, if the market should give way between the time it should have been delivered according to contract, and the time it was actually delivered. This a rule of very general application in commercial dealings; a rule for the assessment of damages in very many breaches of contract. Of course, it has exceptions. If the injury, or alleged lost profits be speculative, or so contingent that no reasonably certain rule can be declared for their measurement, then they can not be recovered on that account. King v. Reynolds, at this term: W. U. Tel. Co. v. Shotter, (Ga.) Cent. L. J., March 21, 1884.

The second rule is, where there are special circumstances in the contract, and its observance, which take it out of the usual course of things. Very many contracts have this character. The following are of this class: Ill. etc. R. Co. v. Cobb, 64 Ill. 128; Booth v. Spuyten, etc. Co., 60 N. Y. 487; Randall v. Roper, Ellis B. & E. (Q. B.) 84; Bowadaite v. Burnton, 8 Taunt. 535; Passinger v. Thorburne, 34 N. Y. 634; Flick v. Weatherbee, 20 Wis. 390; Sneed v. Foord, 1 E. & E. (Q. B.) 602; Horne v. Midland R. Co., 7 L. R. C. P. 583: s. c. 8 L. R. C. P. 131. If these special circumstances be unknown, not communicated, then they are not the natural result of the breach, for they did not result from it in the usual course of things. If, however, they are communicated, they become an implied element of the contract and parties are presumed to contract in reference to such special circumstances. Many illustrations of this rule might be given. We will name but a few. A carrier receives a package for transportation, having the appearance of being of but little value. Nothing about it to show it require special care or tender handling. If he give it such attention as such packages usually require for their preservation, he will not be liable for the unknown extra value it may possess. An agent receives money to be deposited in bank, the object being to meet a paper maturing. It is necessary to avoid protest, that the money be in bank by a given hour, but the agent is not informed of it. He fails to deliver the money in time, the paper goes to protest, and the credit of his principal is ruined. The agent is not responsible for the loss, for he neither expressly nor impliedly contracted in reference to the duty, which alone could have prevented the injury.

What is here last said, is our understanding of the second rule declared in Hadley v. Baxendale. The two rules are distinct. operate in different fields, and to treat them together necessarily leads to confusion. In a very carefully prepared, learned note to the 7th edition of Sedgwick on Dam., Vol. 1, p. 226, is this language: "The rule in Hadley v. Baxendale, as we have seen in the text, is that the plaintiff is entitled to recover, (1) such damages as may fairly and substantially be considered as arising naturally, *i. e.*, according to the usual course of things, from the breach of the contract itself; or (2) such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach.

The rule, or rather rules, declared in Hadley v. Baxendale, as interpreted in the note to Sedgwick, is not difficult to be understood. It furnishes a standard of measurement in ordinary transactions, those marked by no special circumstances. The subject of the contract, or nature of the service contracted for, generally suggests the use for the one, or the purpose of the other. The damage which would suggest itself as the natural result, according to the usual course of things, of a breach of such contract, would be the loss of one, and the failure to enjoy the other, as they thus appeared. Suppose, however, there be special circumstances which impart to the subject or service a value and importance their appearance does not indicate. This is outside the usual course of things, and falls within Baron Alderson's second rule, which requires that the party sought to be charged shall have had notice of such special circumstances when he entered into the contract. A builder undertakes to erect and complete a dwelling by a named day. If no special circumstances are communicated to him when he enters into the contract, the measure of liability to which he will be exposed, if he fails to complete the house by the day named, is the value of the lost use the em-

ployer suffers by the delay, if such damages can be shown by any rule of proximate certainty. Suppose, however, the house has been agreed to be let for a term on a valuable lease, on agreement to let in the tenant on the named day, and the contractor has notice of such lease. If he fail to complete the house by the day named, and the landlord thereby loses his tenant and the profits of his lease, the contractor will be liable for such lost profits. This, by reason of the special circumstances communicated.

In Hadley v. Baxendale, it is said of damages that may be recovered on a breach of contract, that they "should be such as may fairly and reasonably be considered either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it." What is meant by the words "in contemplation of the parties?" It would seem that contracting parties, certainly honest ones, do not contemplate the breach of their contracts when they enter into them, and, hence, can not contemplate the consequences of a breach. Martin, one of the Barons of the Exchequer, who participated in the decision in Hadley v. Baxendale, in the later case of Wilson v. Newport Dock Co., 1 L. R. Court of Exch. 177, used this language: "I do not adopt the qualifications mentioned by Mr. Baron Alderson in the judgment in Hadley v. Baxendale, as applicable to every case. They may have been perfectly right there, but they are not of universal application. * * * And he (Baron Alderson) proceeds to say, 'such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it.' Now this may properly enough be taken into consideration in the case of carriers and their customers, but in the bulk of broken contracts it has no application whatever. Parties entering into contracts contemplate that they will be performed, and not broken; and in the infinite majority of instances the damages to arise from the breach never enters into their contemplation at all." So, in Collins v. Stephens, 58 Ala. 543, we said: "The measure of damages in a suit for a breach of contract, is the injury which results proximately from the breach. And whether the parties, at the making of the contract, contemplated or had in view the damages to result from a breach of such contract or not, does not in the least vary the question, or the measure of recovery." To test the question, let us suppose that in a suit for a breach of contract, the plaintiff makes proof of damages, reasonably certain as to the amount, which is the natural result, that is, the result according to the usual course of things, of the breach of contract, should anyone attempt to depend on the ground that such damages were not, in fact, in contemplation of the parties, when they entered into the contract?

Mr. Baron Alderson's language should be interpreted in the light of the facts he was dealing with. Plaintiffs were claiming a recovery, based on circumstances that were special and exceptional. Those circumstances were not suggested, nor likely to be suggested, by the appearance or nature of the article which was the subject of the contract. Hence, the injury complained of would not arise in the natural or usual course of things. If the special, ulterior purposes were disclosed, they would then become an element of the duty imposed by the contract. The thing of apparently little value, the transaction of apparently minor importance, would thus be raised to great value and commanding importance. This enhanced value, this stimulated diligence, Baron Alderson has, as we think, attempted to describe as being the damages resulting from a breach, "within the contemplation of the parties." Is it not rather a bringing within the contemplation of the parties, the special facts which magnify the transactions, and, as a consequence, the injury likely to ensue from a breach of the contract?

We are aware that the language or phrase we have been criticising, has been repeated and re-repeated in many judicial opinions. It has come to be almost a stereotyped phrase; so general that it may appear to be temerity in us to question its propriety. We think, however, it is in itself inapt and inaccurate, and that its import has been greatly and frequently misunderstood. It is often employed in opposition to, or as the synonym of that other qualifying cause, the natural result of, or, in the usual course of things. We think this a great departure from the sense in which Baron Alderson intended it should be understood. Altogether we think it obscure and misleading, and that an attempt to install it as one of the canons, has caused many, very many erroneous rulings.

But even if we retain the expression we have been commenting on, as a qualifying property of recoverable damages, it is a rule by no means of universal application. Speaking of the decision in Hadley v. Baxendale, Ch. B. Pollock, in Newport Dock Co. v. Wilson, 1 L. R. (Exchr.) 177, said; "It is quite true that the case is not applicable to, and does not decide every case. No rule, no formula could do that. No precise, positive rule can embrace all cases. "It may be, and doubtless is well adapted to cases like Hadley v. Baxendale, where the subject of the contract, relatively insignificant in its primary aspect and apparent purpose, was yet, by special circumstances, magnified into much greater dimensions. This rule was properly applied in that case, because a knowledge of the extrinsic facts would naturally stimulate diligence, can such a rule with any propriety be applied to transactions or lines of dealing in which the same measure of diligence is required in each act or function, without regard to the *quantum* of interest to be affected by it? Legal dogmas should rest on some principles, which can be understood and appreciated."

The telegraph is a modern discovery. Speedy communication is its boasted merit, the object of its use. It is much more expensive than communications by mail, and therefore would not be resorted to, if time were not of its very essence. Its tariff of rates is graduated by the number of words employed, not by the pecuniary value of the telegram, nor the magnitude of the interest it concerns. With few exceptions, imposed by public exigency, it is governed by the law of the mail. Messages must be sent in the order of their handing in, without favor or partiality, without delay and without reference to the value of the interests to be affected. Shear. & Redf. on Neg. sec. 557; Barren v. Lake Erie Tel. Co., 1 Am. Law Reg. 685; Birney v. N. Y. & W. Tel. Co., 18 Md. 341; W. U. Tel. Co. v. Ward, 23 Ind. 377; Leonard v. N. Y. A. & B. Tel. Co. 41 N. Y. 544; Squire v. W. U. Tel. Co., 98 Mass. 232; Parks v. Alta Cal. Tel. Co., 13 Cal. 422. A failure from uncontrollable causes, such as electrical storms, etc., would excuse the company's delay in delivery, but no such excuse is shown here. In Scott & Jarnigan's note to sec. 166, Law of Telegraphs, commenting on Shields v. W. & N. O. Tel. Co., is this language: "Why has the operator any right to know what the message refers to? Or, why the necessity of drawing inferences or conjectures in reference thereto? How will such knowledge aid him in the discharge of his obligation to send the message correctly; what difference does it make, in this respect, whether the message conveyed an order to purchase, or an account of sales? Would such knowledge aid him in the correct transmission of the message," They thought the view taken in Shields' Case "was not the correct one." We fully concur with Messrs. Scott and Jarnigan, and hold that the liability of the telegraph company does not depend on the knowledge the operator may have of the contents of the message.

PRINCIPAL AND SURETY—GUARANTY OF RUNNING ACCOUNT AT BANK—FRESH ACCOUNT AND PAYMENTS—APPROPRIATION — LIABILITY OF GUARANTOR'S ESTATE.

LONDON, ETC. CO. v. TERRY; RE SHERRY.

English Court of Appeal, January 24, 1884.

A banker to whom a guaranty has been given to secure him against overdrafts by his depositor, is not bound after the termination of the guaranty to apply subsequent deposits to the extinguishment of the overdraft at the time of such termination, but may credit it to a fresh account of the depositor.

John Sherry gave to the London and County Bank, a continuing guaranty for moneys from time to time due to the bank from Edward Terry, on the general balance of Terry's account in consideration of the bank allowing Terry to overdraw his account. Sherry died, and at that time Sherry's account was overdrawn to the extent of £677, 17 *s*, 2 *d*. His account was then balanced and closed, and a fresh account opened, in which he was debited, with interest, on the overdraft. No notice of this was given by the bank to Sherry's executors. Terry continued to keep his account with the bank and various sums were from time to time paid into it more than sufficient to discharge the £677, 17 *s*, 2 *d*. He subsequently went into liquidation at which time his account was overdrawn to the extent of £138, 12 *s*, 10 *d*, in addition to the amount of the former overdraft. This action was brought to recover from Sherry's estate the amount overdrawn at the time of Sherry's decease, at which time it was assumed the guaranty terminated, the bank claiming that the sums paid in since Sherry's death, were credited to the new account, and that the amount owing on the guaranteed account at Sherry's death remained unpaid.

Lord Chancellor SELBORNE delivered the opinion of the court:

The Vice-Chancellor has decided this case upon the view that there was either an express or implied contract to appropriate payments received from the debtor after the guarantee had ceased to operate to the discharge of the guaranteed or secure debt. If that were so, the principle upon which the judgment proceeded would certainly be right. If it is not so, then it seems to me the judgment can not be supported. The principle of Clayton's case, and of the other cases referred to by Mr. Davey, is this, that where a creditor, having a right to appropriate moneys paid to him generally, carries them into an account kept in his books, he *prima facie* appropriates them to that account; and the effect of that is, that according to the priority in order of the entries on the one side, and on the other of that account, all payments are *de facto* appropriated. Of course it is absolutely necessary for the application of those authorities that there should be one unbroken account, and entries made by the person having a right to appropriate the payments to that account; and the way to avoid the application of Clayton's case, where there is no other principle in question, is to break the account, and to open a new and distinct account; and when that is done, and the payment is entered to that new and distinct account, whatever other rule may govern the case it certainly is not the rule of Clayton's case or of Bodenham v. Purchas, and other cases of that class. In this case the account was broken. It was not continued, and therefore, if he had a right to do so, the creditor receiving the money after the death of Mr. Sherry did elect to appropriate it to the new account, and not to the other account, whatever might be the proper consequences of that election. Therefore, we are remitted to the question whether there was here an express, or an implied contract to appropriate these moneys in reduction of the secured or guaranteed debt. If there was, of course that could not be defeated by mode of keeping the account

which the creditor might prefer, and the contract must prevail, and in that case no doubt the principle of Pearl v. Deacon, which dealt with securities (and I agree that moneys which by contract are to be appropriated to a particular purpose are as good in favor of the surety as securities), and the cases of that class would in that view of the matter be applicable as the Vice-Chancellor thought them. But is there here, first of all, an express contract to appropriate payments received subsequently to the termination of the guarantee, towards the secured or guaranted debt? The only words in the document which have been referred to as the foundation of the argument that there was such a contract were these: "We, the undersigned, John Sherry and George Terry do hereby guarantee to you the repayment of all moneys which shall at any time be due from Edward Terry to you on the general balance of his account with you." I have read it shortly. It was contended that the effect of that was to entitle them to appropriate in reduction of the guaranteed debt any sums which, on the general balance of any account between Edward Terry and the bankers, might be received by the bankers. This is a question of construction, and as a matter of construction it is as clear as daylight that the account mentioned there is merely the guaranteed account. The word account comes in only in the definition of that which is guaranteed. It says "all moneys which shall at any time be due from him to you on the general balance of his account with you," and if this is an account not guaranteed it is quite impossible to extract from those words an agreement to apply in reduction of the guaranteed account moneys which do not properly enter into it. There is, therefore, no express agreement that any such moneys should be so applied. I assume, as we are bound to assume, if it has been so decided, and there is no appeal from it, that the guarantee, though not expressed to terminate on the death of either of the guarantors, did so terminate. I am quite aware that that has been at different times a controverted question, and perhaps the authorities might be found to have varied upon it, but I assume that to have been rightly determined in the present case. If so, it is quite clear there is no express contract of the kind for which the respondents contend. Then, is there an implied contract from the language used by the surety? A surety is undoubtedly, and not unjustly, the object of some favor, both at law and in equity. I do not know that the rules of law and equity really differ on the subject. It is an equity which enters into our system of law; and that is, that a man who makes himself liable for another person's debt is not to be prejudiced by any dealings without his consent between the secured creditor and the principal debtor. If, therefore, it could be shown that what has been done here was done without the surety's consent, I quite agree he ought not to suffer for it. But there being no express contract, on what ground is to be said that there is an implied contract? I am totally unable to follow it, unless it is this, that the mere fact of suretyship is to take away from the debtor and the creditor those powers of appropriating payments received which otherwise at law they would have had, those payments not being subject to any particular contract with the surety. Now, it seems to me, that although there may not be a case in the books that is in every respect precisely the same as this, there are cases which appear to me to govern it *a fortiori*; they are the cases of Kirby v. The Duke of Marlborough, before Lord Ellenborough in 1813 (2 Mau. & Sel. 18) and Williams v. Rawlinson (3 Bing. 71). The facts in those cases, as I understand, were these: A guarantee of this nature was given, and previously to the guarantee the debtor was already indebted upon an existing account to the guaranteed creditors in a large sum of money, and that pre-existing debt was not the subject of any mention in the contract of suretyship; there was no provision about it one way or the other, and I think in both cases, I am sure in one, the fact that there was any such pre-existing debt was not mentioned by the creditor or the debtor to the surety, and was not known to him. The question arose whether the creditor was entitled to apply payments received from the debtor towards the pre-existing debt, or whether he was bound to apply them in reduction of the guaranteed debt, and it was decided in both those cases that he was entitled to apply them to the pre-existing debt, and was not bound to apply them in reduction of the guaranteed debt. A point somewhat similar, though not exactly the same, also arose in the case of Holland v. Teed, before Sir James Wigram (7 Hare, 50), which I think is one of those cases which favor the doctrine that a general guarantee of this sort is terminated by death, and, therefore, the guarantee being very much of this nature, the question arose as to a sum of money which was in this position. There were outstanding debts not yet matured or payable which were covered by the guarantee, and there was a cash balance of £124, 10s. 7d. at the time of the death to the credit of the debtor with the secured creditor. The account was continued in the ordinary course, and he was permitted to draw out that balance which was to his credit before the bills became due; and the bills afterwards becoming due, resulted in a debt in respect of which the benefit of the guarantee was claimed, and after consideration the Vice Chancellor held that these payments to the debtor being made in the ordinary course of business before the debt upon the bills had become due, the surety had no equity to require it to be retained by the creditor in his hands for his security, there being no express stipulation to that effect. It appears to me that the principles of those cases show, if it were necessary to have authority for the purpose, that the right of appropriation of payments on an account not guaranteed is not intercepted by a contract of this kind. Conse-

quently this appeal must be allowed, and the judgment of the Vice-Chancellor reversed.

COLERIDGE, C.J.—I desire with the Lord Chancellor to reserve any expression of opinion upon an important and interesting question which for different reasons neither side on this appeal discuss, or thinks it worth while to agree; but as far as the Lord Chancellor has expressed an opinion I entirely agree with him.

COTTON, L. J.—I am of the same opinion. The question is whether there is anything in the contract entered into by the surety to prevent the bank from carrying these payments to this new account; and when one looks at it, in my opinion, there is no implied contract to that effect. There is certainly no express contract. What is the guarantee? It is a guarantee, according to the decision which the surety has obtained, with reference only to the account between the bank and the creditor until the bank receives notice of the death of the surety. The account then determines; that is to say, the surety has obtained a decision that no further dealings can take place on the faith of that guarantee after his death. What is the guarantee? As far as I see, the only implied covenant here, as regards that guarantee, is that it shall be carried on in accordance with the general practice of bankers; and that really answers what has been suggested, that this case does not differ from an attempt by a bank to make a new account during the lifetime of the surety; that is to say, before the guarantee terminates. The balance which is guaranteed is the general balance of the customer's account, and to ascertain that all accounts existing between him and the bank at the time when the guaranteed account comes to an end must be taken into account. So that it would be impossible for the bank to say to the prejudice of the surety, "We carry these sums, which have been paid by the customer, not to an account of which we ascertain the balance, but to a new account, and we refuse to bring [those sums to the credit of the banking account to the relief of the surety." That of course is a different thing. That would be an improper dealing; improper in this sense, that it would prevent the balance of the guaranteed account being ascertained in accordance with the terms of the guarantee. But here the guarantee is one which, according to the contention of the surety, has not guaranteed in any way an account after the death, and there being nothing relating to the mode in which the bank was to deal as regards that account, there is nothing in the guarantee to prevent the bank acting as they have done. Therefore, in my opinion, the decision of the Vice-Chancellor was wrong, and must be reversed.

Earl of SELBORNE, L. C.—The appellants will add their costs in the court below to their debt as a part of their costs of proving the claim. The respondents to pay the appellants their costs of the appeal without prejudice to any application to be allowed the costs so paid, and their own costs of the appeal out of the estate. The respondents' costs below to be costs in the action.

NOTE.—The debtor in the principal case merely deposited money, *i. e.* the creditor got money of the principal into his possession, and the question in controversy was whether he was not bound to protect the interests of the surety by devoting that money to the cancellation of the principal's indebtedness, to the relief of the surety, or whether he could conduct his dealings with the debtor upon a new basis. The general and well known rule, with reference to the application of payments is that a creditor to whom is owed several debts, may apply a general payment to which debt he may deem best, and he is not bound to apply any payment to a debt for which a surety is jointly responsible. Stamford Bank v. Benedict, 15 Conn. 437; Martin v. Pope, 6 Ala. 532; Gaston v. Barney, 11 Ohio St. 506. See Allen v. Culver, 3 Denio. 284; Pemberton v. Oaks, 4 Russell, 154. But see Merrimack County Bank v. Brown, 12 N. H. 320. Where principal and surety were liable for a debt, and afterwards the principal obtained further advances from the creditor, at the same time depositing with him certain copper to secure his indebtedness, but without specifying what indebtedness, the principal failing, it was held that the creditor might lawfully apply the proceeds of the copper to the payment of the subsequent advances. Per Dr. Lushington, in the Bank of Bengal v. Radakisienmitter, 4 Morris P. C. 140. *cf.* Bardwell v. Lydall, 7 Bing. 489; s. c. 5 M. & P. 327. But where one held two judgments, and sold the debtor's property at sheriff's sale, and there was a surety on the older judgment, he was held entitled to have the money realized from the sale applied to the payment of the older judgment. Simmons v. Cates, 56 Ga. 609. And the same principle was applied in Hollister v. Davis, 54 Pa. St. 808, where a general payment was held to discharge a debt secured by guaranty. But a case somewhat parallel to the principal case will be seen in Lysought v. Walker, 5 Bligh. (N. R.) 1, where it was left to the jury to say whether remittances by an agent should be applied to a balance struck previously, or to balance subsequent receipts by him. See Maryatts v. White, 2 Starkie, 101, where it was held that payments should be applied to new debts upon which a surety was bound, and not to old debts for which the debtor was solely responsible.

A very nice question has arisen as to the application of payments by a principal, when there are different sets of sureties for the same officer covering different periods of time and payments are made by him, the following has been held to be the rule as to the manner in which they shall be applied. First, as the debtor may direct; secondly, if the debtor makes no such direction, then the creditor may apply it as he pleases, at any time, but he can not change the application when once made; thirdly, if neither the debtor nor the creditor make the application, then the law will make it according to the circumstances of each particular case, and if there be no other controlling circumstances, the application will be made according to the order of time, paying first the oldest debt. Chapman v. Commonwealth, 25 Gratt. (Va.) 721; See also Pickering v. Day, 3 Houston, (Del.) 475; Myers v. United States, 1 McLean, 493; Stone v. Seymour, 15 Wend. 19; United States v. Linn, 2 McLean, 501. See *contra* Readfield v. Shaver, 50 Me. 36. See also State v. Long, 39 N. J. L. 539. But where money was collected by an officer during his second term, the payments made by him into the treasury, extinguished the amount due in that term, not in the first term. United States v. Eckford's Executors, 1 Howard, (U. S.) 250. The

rule as to application of payments in such a case is governed by the fact that the bonds and terms were entirely distinct, and each must stand by itself.

WILL—CONSTRUCTION OF POWERS OF EXECUTOR TO SELL.

SNELL'S EXECUTORS v. SNELL.

New Jersey Court of Chancery, February Term, 1884.

A testator gave a life estate in certain lands to his wife, with remainder in fee to his executors, with directions that, after her death, they should convert the property into cash and divide the proceeds among his children when the youngest should have attained twenty-five years of age. *Held*, that the executors could, with the widow's consent, sell the lands in question in her lifetime.

Bill for construction of will etc. On final hearing on pleadings and proofs.

Mr. E. W. Strong, for complainants.

The CHANCELLOR delivered the opinion of the court:

This suit is brought to obtain a construction of the will of Thomas Snell, deceased, late of Middlesex county, who died September 1st, 1874. By the will (which was made in August, 1874), the testator, after directing payment of all his debts and liabilities, gives to his wife, for her life, his farm and household furniture, live stock and farm implements and everything movable or immovable in and about the farm then belonging to him. To his executors he gives, in trust, $15,000, which they are to invest and keep invested during her life, and pay her the income thereof not exceeding $1,000 per annum. He then directs that after her death the farm and the $15,000 shall "revert" to his executors and "be disposed of by them in the same manner as the rest and residue of his estate thereinafter mentioned." He next gives to his executors, in trust for the benefit of his heirs-at-law, his sons Thomas, Robert, George and William, land in Westchester county, New York, and leaseholds in the city of New York, with power to convert them into money at any time before the estate shall be divided, and whenever, in their judgment, the estate will be benefited by the sale. He then gives to his executors, in trust for the benefit of "said heirs-at-law" (his sons), all and singular the rest and residue of his estate, "both real and personal, consisting of bonds, stocks, notes and money and other securities," and declares that it is his will that his estate shall not be divided or the heirs be paid their respective shares thereof until the youngest of them shall have attained the age of twenty-five years; and he further directs that upon the arrival of the youngest of them at that age, the estate shall then be divided among them in equal shares. He also directs that until such division or distribution shall take place, the executors invest and keep invested the money of the estate and accumulate it, and adds that they are not to pay away any portion of it except in the case of the illness or death of any of his "said heirs-at-law," in which event they are to have power to make such disbursements as in their discretion the emergency may require. He also provides that in case any of his "said heirs" shall die before the division of the estate shall take place, the share of such decedent shall, if he be married and have issue, go to the issue; but if no issue, then the decedent's wife shall "receive her dower out of said share, and the rest and residue shall revert to the surviving heirs."

The questions submitted for decision are whether the executors have power to sell the farm; and if so, whether they can execute the power before the death of the widow, she being desirous that the sale be made and being willing to join with them in the conveyance or to convey or release her estate to them or the purchaser.

The testator intended to give his wife, for life, the farm (with remainder in fee to the executors), and $1,000 a year of the interest of $15,000; the rest of his property (except, of course, the $15,000) to go to his executors, to be converted by them into cash and invested for the benefit of his children, and to be equally divided among the latter when the youngest should have attained to the age of twenty-five years. At the death of the widow, whether before or after the youngest child should have reached the age of twenty-five years, the $15,000 and the farm were to be disposed of in like manner with the rest of the estate.

The executors undoubtedly have power to sell the farm. The will provides that after the decease of the testator's widow that property is to "revert" to the executors and be disposed of by them in the same manner as the rest and residue of the estate thereinafter mentioned. It then gives to the executors the land and leaseholds in New York with express power of sale. This is followed by the gift to them, in trust, for the benefit of the testator's children, of all the rest and residue of his estate, both real and personal. This gift of the New York property and the residue is for the purpose of enabling the executors to take care of, invest and accumulate those parts of the estate and divide them when the time of distribution arrives. The gift is unqualified, except by the trust. Moreover, it is of personal and real estate blended together, to be divided and paid over in shares, and in the meantime to be invested for accumulation.

Where an executor is directed by the will or bound by law to see to the application of the proceeds of the sale, and no direction is given as to the person by whom the sale is to be made, or if the proceeds of the sale in the disposition are mixed up and blended with the personalty—which it is the duty of the executor to dispose of and pay over—then a power of sale is conferred by implication. Lippincott v. Lippincott, 4 C. E. Gr. 121. There can be no doubt that the executors have power to sell the farm, and I am of opinion

that with the consent of the widow, and on her releasing to them or to her purchaser her life estate, or joining with the executors in their conveyance of the property, they may lawfully convey the farm at once. The will provides that after the widow's death the farm shall "revert" to them, and be disposed of by them in the same manner as the rest and residue of the estate thereinafter mentioned. The intention of the testator, in this provision, was to give to the executors the remainder in fee. And he intended that, after the termination of his wife's life estate, whether by death or otherwise, the property should go to them. There is no evidence of any intention, on his part, that it shall be held unsold until after her death, for any reason, whether prospective rise in value, benefit of infant children or anything else. The possibility that the widow might desire to part with her interest in the property before her death, was not contemplated by him, and it seems clear that, had he contemplated it, he would have provided for the sale of the property by the executors and her together, or by them with her consent. In Uvedale v. Uvedale, 3 Atk. 117, where a testator, by his will, directed that his wife should have the rents, etc., of certain lands for her life, and directed that, after her death, the property be sold, Lord Hardwicke said that the words, "after her death," were not put in to postpone the sale, and directed that the sale be made. See also, Co. Litt. 113 a, note; 8 Vin. Abr. 466, 469; Sug. on Powers, 349, 350. In Gast v. Porter, 13 Pa. St. 533, it was held that a power given to executors to sell at the death of the widow was well executed, if the widow, for whose benefit the sale was postponed, joined as one of the executors in the deed, and that the fee would pass to the purchaser. The decision was put on the ground that the intention of the testator governed the case, and made it an exception to the general rule, that a devise to executors to sell on a contingency can not be executed until the contingency happens. And so, too, in Styer v. Freas, 18 Pa. St. 339. Mr. Ram, in his work on Assets, says: "The rule to be deduced from the cases is that, where the property which is the subject of the power of sale is devised for life, the time for sale will depend on the intention to be collected from the whole will; and, so far as the particular words may not be governed by the context in the will, on the weight due to the authorities, grounded on the same or similar expressions, and, consequently, the time for sale may be either before or after the death of the tenant for life, according to the circumstances of the particular case." Ram on Assets, 108.

In the case under consideration the testator gives a life estate to his wife with remainder in fee to his executors, and directs (substantially) that after her death they convert the property into cash to divide it among his children. Here is not a mere power of sale, but a gift of the property to the executors in fee, subject to the life estate. The widow wishes to remove from the farm and desires to have it sold, if possible, and for that purpose is willing to relinquish her life estate and to convey it to the executors or to the purchaser, or any one else, in order to make a clear title to the property. George Snell is dead. He died since the testator's death. He was never married and left no will. Thomas and William are both past the age of twenty-five years. The former is thirty-eight and the latter twenty-seven. Robert left home in 1871 and has never since (a period of about thirteen years) been heard of, although much effort has been made to obtain tidings of him. He was then unmarried. If living, he is now about thirty-four years old. Thomas Snell and Maltby G. Lane are the executors. They are desirous of selling the property. A price is offered for it, which, in their judgment, and in that of William, also, is a good one, and they and he think it would be advantageous to all persons interested to sell it at that price. In my judgment, the executors, with the consent of the widow and her release of her life estate, have power to sell the property now.

NOTE.—The general rule that, where a power of sale is to be exercised at a specified time, its attempted execution before then is invalid, has been recognized in this State, in Booraem v. Wells, 4 C. E. Gr. 87; Hampton v. Nicholson, 8 C. E. Gr. 423.

In Isham v. Del. etc. R. Co., 3 Stock. 227, lands were conveyed, in 1834, in trust to be leased until 1840, and then to be sold, and the proceeds invested, and the interest therefrom paid to the grantor's sisters, A and S, for life, and to their children after their death, until the youngest child should be twenty-one, and then the principal to be divided among said children *per capita*. In 1836, before A and S had married, they, with the trustee, reconveyed the lands to the original grantor. A and S afterwards married, and, in 1856, both had children. *Held*, that the reconveyance, in 1836, was void, but capable of confirmation by the trustee after 1840. See Hetzel v. Barber, 60 N. Y. 1.

In Fairly v. Kline, Pen. *754, lands were devised, in 1785, to testator's wife for life or widowhood, and then power was given to the executor to sell and divide the proceeds among testator's children, equally. In 1797, the executor sold the lands, with the widow's consent, and paid over the proceeds to the surviving children, who paid the widow £5 each, annually, until her death, in 1801. No question as to the validity of the executor's sale was raised, as the case turned on another point.

In Meyrick v. Coutts, 1 Sug. on Powers, *335 [*350], under a devise to testator's wife for life, and after her decease, a power to trustees to sell and to pay the money among the children of B, who had an infant child then living, a bill by the widow against the trustees and infant for an immediate sale, was, after two arguments, dismissed.

In Smith v. Great Northern R. Co., 23 W. R. 126, a testator gave to his wife the personal use of a leasehold messuage for her life, and if she should not think fit to reside therein, the premises should form part of his residuary estate. He then directed the conversion of his real estate, with power in his executors to postpone such conversion. Under the trusts of the residue, the widow took one-fourth of the income. A railway company having taken the premises, under its compulsory powers, while the widow was in occupa-

tion, made an agreement with her as to her interest, and a separate agreement with the trustees. *Held*, that, although the house, subject to the interest of the widow, was part of the residuary estate, it would not be a proper exercise of the executor's trust to sell during the continuance of the widow's occupation.

In Mosley v. Hide, 17 Q. B. 91, lands were conveyed to trustees, to the use, after the husband's death, of his wife for life, and on trust, upon her death, to sell and divide the purchase-money among the children of the marriage on their respectively attaining twenty-one. E and M were the children, and after they had attained twenty-one, and the husband had died, the trustees, during the wife's lifetime, sold the lands. *Held*, that the sale was void. See Cox v. Day, 13 East, 118.

In Want v. Stallibrass, L. R. 8 Exch. 185, vendors sold as trustees under a will which devised the estate to them on trust to pay the income to F. S. for life, and thereafter to sell the estate and hold the proceeds "upon the trusts for the children of F. S.;" and it was further stated by counsel that F. S. would join in conveying the property. The trusts for the children were that the proceeds should be paid to those who were living at testator's death, to be paid to them at twenty-one, or if daughter, at twenty-one or on marriage. All of said children were over twenty-one at the time of the sale. *Held*, that specific performance would not be decreed.

In Henry v. Simpson, 19 Grant's Ch. 522, a testator gave to his wife during her life all the rents and issues of his property for her sole use; then that his property should be divided into three shares—one to his wife, one to his daughter M, and one to his daughter E; that M should have her portion after her mother's death, and should invest it for the benefit of her children; that E. should have one-half of her portion absolutely, and the interest of the other half for her life, and that then this half should go to M's children, unless E had a child, and if so, to E's child. The wife and daughters were executrixes. *Held*, that the lands could not be sold during the lifetime of the wife, even with her consent.

In Davis v. Howcott, 1 Dev. & Bat. Eq. 469, there was a devise of the use of certain lands to testator's widow during the term of her natural life, and after her death said lands were to be sold by the executors and the proceeds of the sale divided among testator's four children or their survivors. The widow and executors, by order of the court, on their joint petition, sold the lands, and no part of the purchase-money ever came to the use of the children. *Held*, that their legal title to the land, after the widow's death, was not barred.

In Jackson v. Ligon, 3 Leigh, 161, power to sell lands was given to an executor after the death or marriage of testator's wife, for whom he made provision in his will. The wife renounced those provisions, and the executor sold thereafter, while she was living and unmarried, and his sale was held void.

In Rope v. Sanders, 21 Gratt. 60, under a similar will, dower was assigned to the widow after her renunciation, and she subsequently joined with the executor in selling the devised lands. *Held*, that the executor had no power to sell during her widowhood; and held, further, that the court could set aside the sale, so far as made by the widow.

In Hall v. McLaughlin, 2 Bradf. 107, the testator devised certain property to his wife during her widowhood until his youngest son should arrive at age, when he directed it to be sold by his executors and the proceeds divided. The widow died before the youngest son attained twenty-one. A petition by one of those entitled to the proceeds of the land when sold, to compel the executor to sell, was dismissed. Query. Under such circumstances, who is entitled between the death of the widow and the time when the youngest son attains twenty-one? See Levet v. Needham, 2 Vern. 138; Mansfield v. Dugard, 1 Eq. Cas. Abr. 195; Carter v. Church, 1 Ch. Cas. 113; Boraston's Case, 3 Co. 19; Lomax v. Holmeden, 3 P. Wms. 176; Coates v. Needham, 2 Vern. 65; Castle v. Eate, 7 Beav. 296; Laxton v. Eedle, 19 Beav. 321; Green v. Tribe, 38 L. T. (N. S.) 914; Simpson v. Cook, 24 Minn. 180; Williams v. Murrell, L. R. 23 Ch. Div. 360.

In Sutherland v. Northmore, 1 Dick. 56, a *feme covert* had a power, under her marriage settlement, to create a term and to raise money after the death of her husband. Her execution thereof, during her husband's lifetime, was, on the case being sent to the king's bench, held to be good; and this holding the court of chancery confirmed. See Wandesforde v. Carrick, L. R. 5 Irish Eq. 486.

In Duke v. Palmer, 10 Rich. Eq. 380, a testator appointed his wife and son executors, and gave to his wife several slaves during her life, and at her death to be sold and equally divided among his lawful heirs. The son alone qualified as executor, and afterwards, with his mother's co-operation, sold one of the slaves for a full consideration. The mother survived eleven years thereafter. *Held*, that one of testator's heirs could not, after the mother's death, set aside the sale as against a *bona fide* purchaser of the slave from the original purchaser, but that his only remedy was against the executor for the proceeds of the sale.

In Bazemore v. Davis, 48 Ga. 339, lands were held in trust for A for life, and at her death, to her children. The trustee sold and conveyed the whole estate, as trustee, A entering on the deed a written consent to its execution. *Held*, that A did not thereby forfeit her life estate in the premises, so that a right of action immediately accrued to the remaindermen. See, also, Champlin v. Champlin, 3 Edw. Ch. 571; Styer's Appeal, 2 Grant's Cas. 453; Loomis v. McClintock, 10 Watts 274; Bartle's Case, 6 Stew. Eq. 46; Greene v. Aborn, 10 R. I. 10.

The court has no jurisdiction to order a sale before the time designated in the power, on the ground that it would be beneficial to the parties, Johnstone v. Baker, 8 Beav. 233; Bristow v. Skirrow, 27 Beav. 590; Blacklow v. Laws, 2 Hare, 40; Troy v. Troy, Busb. Eq. 85; Simpson v. Cook, 24 Minn. 180, 27 Id. 147; nor the legislature, Rodman v. Munson, 13 Barb. 63; Ervine's Appeal, 16 Pa. St. 256; see Clarke v. Hayes, 9 Gray, 426; Mohr v. Porter, 51 Wis. 504; Forster v. Forster, 129 Mass. 564; Cooley's Const. Lim. (4th ed.) *97.

JOHN H. STEWART.

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—BREACH OF COVENANT.

The only remedy the grantee in a deed has to be reimbursed for taxes paid by him is to sue the

grantor for breach of his covenant against incumbrances; he cannot sue for money paid. *Patterson v. Taney*, S. C. Mo., May 12, 1884.

2. ACTION — TENANTS IN COMMON — JOINDER—BREACH OF WARRANTY.
An action brought by tenants in common of the same land, each owning one-half, derived by different dates, for breach of warranty for quiet enjoyment common to both deeds, is properly brought, they being jointly interested, and having been jointly damaged. *Blondeaus v. Sheridan*, S. C. Mo. May 19, 1884.

3. ADMINISTRATION—SALE OF REAL ESTATE—WASTE—RIGHT OF CREDITORS.
A creditor's application for sale of real estate of a decedent for insufficiency of personal assets can not be resisted on the ground that the insufficiency has been caused by waste of administrators, and that he should sue upon their bond. *In re Shackelford's Estate*, S. C. Mo., May 12, 1884.

4. ADMINISTRATION — WASTE — IMPEACHING ACCOUNT.
So long as the final settlement of administrators stands unimpeached, it does not lie in the mouth of an heir in a collateral matter to set up waste by them in their management of the estate. *In re Shackelford*, S. C. Mo., May 12, 1884.

5. ADMINISTRATION—WASTE—WHAT AMOUNTS TO.
The fencing of the lands of an estate, payment of attorney's fees, etc., all done by administrators in good faith, and strictly for the permanent benefit of the heirs, cannot be charged as waste, so long as such heirs avail themselves of the full benefit of such expenditures. *In re Shackleford's Estate*, S. C. Mo., May 12. 1884.

6. BANKRUPTCY-SUBJECTING EQUITABLE INTERESTS TO PAYMENT OF DEBTS—LEX REI SITÆ.
The question of subjecting the equitable interest in the real estate of a bankrupt to the payment of his debts is one to be settled according to the local laws in the State wherein such real estate is. *Spindle v. Shreve*, U. S. S. C., May 5, 1884; 4 S. C. Rep. 522.

7. CHATTEL MORTGAGE—SUFFICIENT DESCRIPTION.
Where a mortgage of cattle conveyed "40 cattle of different sizes and ages, on my farm in P. county" the mortgagor having many more thereon, the mortgage is void for want of proper description as against third persons. *Stonebraker v. Ford*, S.C. Mo. May 12, 1884.

8. COMMON CARRIER—CONTRACT BETWEEN RAILROADS—LIABILITY FOR ACCIDENTS.
Where a railroad running from B to C desiring to connect by another railroad with A, to which the latter ran through B and made a contract with the latter to that end, the latter furnishing the motive power and crew, the former the cars and trainmen, over which between A and B the latter was to have entire control, and the latter to receive a percentage of all the gross earnings of the former as to transportation in which the latter road was included, the former company is not liable to a passenger injured at a station between A and B by the negligence of the engineer, while getting off the train made up of the former's cars and bound for its road, he having purchased transportation on the latter's road entirely, from which the former received nothing, and over which it had no control. *Smith v. St. L. etc. R. Co.*, S. C. Mo. May 12, 1884.

9. COMMON CARRIER — NEGLIGENCE — HORSE CAR RAILWAY—PRIMA FACIE PRESUMPTION.
1. Where by a sudden jerk of a horse car a passenger who has not had time to be seated or catch the straps, is thrown forward and his arm thrust through the window, a presumption of negligence arises on the part of the defendant, which will warrant a verdict against it. 2. Horse car companies can not be said to be exempt from the same degree of care as steam companies. They are bound to exercise all proper care. *Dougherty v. Mo. R. Co.*, S. C. Mo., May 5, 1884.

10. CONDITIONS—CONVEYANCE TO TOWN.
A condition in a conveyance of land to a town that if it should not erect a town building thereon within five years is not void as against public policy, as fettering the enjoyment of the estate, as obliging the city to exercise legislative functions without reference to public necessities, or as tending to effect a purpose injurious to the popular morals. It is a proper control over the disposition of one's property. *Clark v. Inhab. of Brookfield*, S. C. Mo. May 12, 1884.

11. CONSTITUTIONAL LAW—COMPELLING MINISTERS TO RETURN EVIDENCE OF MARRIAGE.
A statute compelling, under pain of penalty, every person solemnizing any marriage, being qualified so to do, omitting to return within a specified period to the recorder of the county a certificate of such marriage is not unconstitutional, but is a legitimate exercise of the legislative power. *State v. Madden*, S. C. Mo. May 19, 1884.

12. DEED—DELIVERY—PRESUMED WHEN.
Where no manual delivery of a conveyance takes place, and it is not examined by the grantee, nor placed upon record, although he makes a reconveyance of the premises to the husband of the grantor's *cestui qui trust*, and it was the intention of such husband to record all the deeds in an emergency, there is no evidence of an intent to pass title to warrant a presumption of delivery of the deed. *Miller v. Lullman*, S. C. Mo. May 12, 1884.

13. DEED—FRAUD UPON CREDITORS—RIGHT OF CREDITORS TO DISPUTE TITLE TO PRODUCTS OF LAND.
Where a deed is made for the purpose of defrauding creditors, with the secret trust for the grantor, the creditors may consider the title to the products of the land to be in the fraudulent grantor, and levy upon the same as his property. *State v. McBride*, S.C. Mo. May 5, 1884.

14. EVIDENCE—INSANITY—BURDEN OF PROOF.
The doctrine adopted in Kentucky that insanity must be proved by defendant, in criminal cases, but only by a preponderance of proof. *Ball v. Commonwealth*, Ky. Ct. App. April 10, 1884; 16 Chicago L. N. 289.

15. EVIDENCE—PAROL—TO ALTER CONTRACT.
Where a grantee accepts a deed in which the grantor covenants to warrant the premises against all lawful claims, except certain taxes, the grantee can not show that as a part of the consideration, the grantor, by a parol contemporaneous agreement agreed to pay such taxes. *McLeod v. Skiles*, S. C. Mo. May 19, 1884.

16. GARNISHMENT—DEBT OR CREDIT.
Where an estate is as to its personalty, insufficient to pay debts, and the executors are authorized to sell the real estate, the distributive share then remaining due to the heirs or legatees, is not subject

to be holden by garnishee process served before such sale took place. *Capen v. Duggan*, S. J. C. Mass. 7 Mass. L. Rep. May, 15, 1884.

17. GARNISHMENT—JOINT JUDGMENT.
The interest of one of two joint judgment creditors in a judgment, cannot be reached by garnishment. *McDonald v. Facquah etc. Co.*, Eng. Ct. App. May 1, 1884; 74 L. T. 30.

18. INTEREST AFTER MATURITY — CONVENTIONAL RATE.
The doctrine that the contract rate continues after the maturity of an interest, although no words indicative of such an intent are employed, is adopted in Missouri. *Borders v. Barber*, S. C. Mo., May 19, 1884.

19. INTEREST—JUDGMENT NOT A CONTRACT.
A judgment is not a "contract" within the meaning of a statute giving a creditor the same rate of interest until the contract is performed. It carries interest according to the state of the statute law only. *O'Brien v. Young*, N. Y. Ct. App., April, 1884; 25 N. Y. Reg. 949.

20. JUDGMENTS AGAINST LUNATIC VOIDABLE — RIGHTS OF BONA FIDE PURCHASERS.
A judgment against a lunatic is not void but voidable merely, and a sale upon execution to a *bona fide* purchaser transfers the title and protects it from attack. *Head v. Sack*, S. C. Mo. May 5, 1884.

21. JUDGMENT—VOID IN PART NOT VOID IN TOTO COLLATERALLY.
Where the statutes of the State permit a joint contract to be treated as a joint and several contract, a judgment against all the contractors is good as to those competent to contract, although void as against married defendants, and is not subject to collateral attack as against the former. *Holton v. Towner*, S. C. Mo. May 12, 1884.

22. LIMITATIONS—NEW PROMISE AND ACKNOWLEDGMENT—REVIVER OF MORTGAGE.
Where the maker of a note who holds another note against his creditor surrenders it, and receives a credit upon the former, and he signs a memorandum upon the back of such former note to the effect that a certain balance is due, after the debt is barred, this revives not only the note, but also a mortgage given to secure the same. *Johnson v. Johnson*. S. C. Mo.. May 5, 1884.

23. MORTGAGE—IS A MERE SECURITY FOR DEBT.
A mortgage is a mere security for debt, and the mortgagee is not entitled to the rents and profits until he gets possession by foreclosure. *Teal v. Walker*, U. S. S. C.; Apr. 7, 1884; 4 S. C. Rep. 420.

24. MORTGAGE—PREMATURE SUIT FOR POSSESSION.
Where a mortgage is given to secure a surety against liability, the mortgagee has no right to recover possession, until he is obliged to pay the indebtedness, though it was conditional that he should be entitled to possession upon default in the payment of any part of "the said debt," referring to the mortgagor's debt. *Stonebraker v. Ford*. S. C. Mo., May 12, 1884.

25. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE WHEN NOT A DEFENCE.
When one discovers the danger in which another lies, and negligently fails to avert it, no negligence, however gross, of the latter can excuse the former from answering the full consequences, and the payment of all the damage done. *Werner v. Citizens' R. Co.*, S. C. Mo., May 17, 1884.

26. NEGLIGENCE– DUTY OF DRIVER OF HORSE CAR.
Where the driver of a horse car on a dark night drives over a man, seeing an object on the track, he cannot be heard to say that he believed it to be a sack of oats, as it would be a confession of negligence of some degree. When he sees an object before him due care requires him to stop and remove the obstruction whatever it may be. *Werner v. Cit. R. Co.*, S. C. Mo., May 12, 1884.

27. PARNERSHIP—RIGHTS OF RETIRING PARTNERS.
A retiring partner who has sold his interest in the firm to his co-partners will be enjoined from sending circulars to the customers of the old firm, soliciting their custom. *Pearson v. Pearson*, Eng. H. Ct. Ch. Div., May 1, 1881; 74 L. T. 30.

28. PATENT LAW—MANDAMUS TO COMMISSIONER.
While the patent commissioner may recall his decision allowing a patent at any time before the Secretary of Interior signs the letters, if he makes no such movement after allowing a patent, mandamus will lie to compel him to issue a patent. *U. S. v. Butterworth*, S. C. D. C. April 14, 1884; 12 Wash. L. Rep. 242.

29. PATENT LAW—MANDAMUS TO COMMISSIONER—WHEN ISSUABLE.
The decision of the Commissioner of Patents on the right of an applicant to receive a patent, is an act of executive discretion and cannot be interfered with by mandamus. *U. S. v. Butterworth*, S. C. D. C., April 14, 1884; 12 Wash. L. Rep. 242.

30. PLEADING—DENIAL OF SIGNATURE.
An answer setting forth that the defendant "denies the signature of the alleged note described in plaintiff's declaration," is not a special denial of the genuineness of the signature sufficient to compel the plaintiff to prove it. *Spooner v. Gilmore*. S. J. C. Mass. 7 Mass. L. Rep. May 8, 1884.

31. PLEADING — VARIANCE — FRAUDULENT WARRANTY—ABSENCE OF FRAUD.
If in an action for fraudulent warranty, there is no fraud proved, there is a variance, although breach of warranty is established, and the action being conceived *ex delicto*, must fail. *Sweeny v. Vroman*, S. C. Wis. April 8, 1884; 19 N. W. Rep. 46.

32. PROBATE LAW—PAYMENT TO DISTRIBUTEES NO DEFENCE TO APPLICATION OF CREDITOR.
It is no defence to an application of creditor for an order upon an administrator for payment of his demand assigned by the court to a particular class, that prior thereto, he had paid all the funds in his hands to the legal distributees and his annual settlement had been approved. *North v. Priest*, S. C. Mo. May 19, 1884.

33. PROBATE LAW—RIGHTS OF EXECUTOR.
A court will not make a decree directing the payment of money to an executor, so that it may pass through his hands merely and be paid back again to the defendant, where all debts have been paid, and no one is injured by the defendant, the owner for life, having collected the money herself. *Marsden's Appeal*, S. C. Pa. 14 Pitts. L. J. 380.

34. PROMISSORY NOTES—BONA FIDE HOLDER FOR VALUE.

Mere forbearance to make an attachment in a suit against a bank is not such a valuable consideration as will make the plaintiff a *bona fide* holder for value of a note transferred to him. *Bone v. Tharp*, S. C. Iowa, April 10, 1884; 18 N. W. Rep. 906.

35. PUBLIC LAND—RIGHT OF SETTLERS TO PRE-EMPT.

The legal representative of one who had settled on land in anticipation of the time when it would be opened for pre-emption, and lived and died on it, may, upon pre-emption becoming possible, have the title to such land made complete in him, and his rights can not be affected by a stranger who, meantime, occupies the land for the purpose of defeating him. *Quinn v. Chapman*, U. S. S. C. April 12, 1884; 4 S. C. Rep. 509.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES ANSWERED.

Query 46. [18 Cent. L. J. 358.] A proved upon government land, fraudulently mortgaged land to B, and then hied away to new fields. B endorsed note, and assigned mortgage to C for its face, endorsement "without recourse." C commenced suit to foreclose, and got as far as a sale, and then ascertained that A's entry had been cancelled on the land. So far as known B acted honestly. Is B liable to C for amount paid?

Wichita. KANSAS.

Answer. In Dumont v. Williams, 5 Am. L. Reg. 330, the Superior court held that one who indorsed a note "without recourse," did not warrant it to be genuine; and that he would not be liable unless transferred in payment of a precedent debt, although it turned out to be a forgery. But the Supreme Court repudiated that doctrine. S. C. 18 Ohio St. 515. In Daniels on Neg. Inst. sec. 670, 700, it is said that such an indorser is not liable unless it be shown that some of the prior signatures are not genuine—or that the note was invalid between the original parties for want or illegality of consideration—or that some prior party was incompetent or the indorser without title. Schouler (Pers. Prop. 1 Vol. 586, 2 Vol. 673) says such an indorsement implies that it is merely a formal one, and that the holder must not regard the indorser as subjecting himself to the usual responsibilities of an indorser. In Challis v. McCrum, 9 C. L. J. 149; 22 Kan. 157, such an indorser is held not only to warrant the instrument to be genuine but that it expresses the exact legal obligations of the prior parties. In Smithers v. Bircher, 2 Mo. App. 499, the defendant endorsed "without recourse," but during the negotiations had represented it was well secured and a first lien on certain real estate. Defendant was held liable for amount of note, it appearing that it was not a first lien, although defendant supposed it was when he transferred the note. Therefore, if B represented the mortgage to be valid, or if it was taken in payment of a debt under a mistake of fact, B would be liable, otherwise not. Bell v. Dagg, 60 N. Y. 528.

Hamilton, Mo. CROSBY JOHNSON.

NOTES.

——A western coroner's jury recently rendered the following verdict in the case of a man found dead in the water: "The deceased came to his death from a blow on the head, inflicted by some unknown person, either before or after he was drowned."

——The *Solicitors' Journal* says that Benjamin's great characteristic "as an advocate was his uncommon combination of legal knowledge and accuracy with adroit and persuasive rhetoric." Another of his characteristics was his manner of charging fees. "At first" he said "I charge a retainer, then a reminder, then a refresher, and lastly a finisher."

——A very interesting case upon the law of married women arose recently before the English High Court of Justice, Crown Cases Reserved. The laws of England give the same remedy to husband or wife against each other for the recovery of their property as against strangers. This was held not to authorize a husband to testify against his wife in a criminal prosecution for larceny of his property. See Reg. v. Brittleton, 48 J. P. 295.

——He was a young lawyer and was delivering his maiden speech. Like most young lawyers, he was florid, rhetorical, scattering and windy. For four weary hours he talked at the court and the jury, until everybody felt like lynching him. When he got through his opponent, a grizzled old professional, arose, looked sweetly at the judge and said: "Your Honor, I will follow the example of my young friend who has just finished, and submit the case without argument." Then he sat down and the silence was large and oppressive.

——The case of Judge Reid of Kentucky, is a sad one. A lawyer who was disappointed by one of the decisions of that judge, horsewhipped the former in the streets. The judge's veneration for the law, and abhorrence of crime forbade him to retaliate, and he was deaf to the calls of public sentiment to decide the matter according to the code. The pressure of public sentiment, which he was seeking to oppose, became so heavy, that at last, in a moment of despair, he took a revolver and made away with his life. He was known as an able judge, was a prominent candidate for a seat upon the Court of Appeals bench, and his loss will be felt. His death is all owing to his own humane feelings, and to cruel public sentiment, which still recognizes the code of honor.

——The recent decisions of petty juries in several States, in the face and eyes of common sense and the rights of the community to protection against crime, call to mind an incident that occurred in Massachusetts between sixty and seventy years ago. This was before the days of railroads, when travel was by stage or private conveyance. A stage left Boston with its complement of passengers, among whom were two young men who got into an argument on the question whether the Creator foreknew all things, one of them asserting positively that he did, and the other as positively that he did not. After a little lull in the conversation one of them turned to a passenger well in years, and asked his opinion. "Well," said he, "my opinion is the Creator foreknew all things that ever took place or ever will take place with one exception, and that is the verdict of a petty jury." He was a highly esteemed judge who had long been on the bench and was still there.